143-3 10

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 156.

WILLIAM P. DUNWOODY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 5, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 156.

WILLIAM P. DUNWOODY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition, filed August 18, 1886	1	1
Traverse, filed September 22, 1886	5	3
Counter-claim, filed February 23, 1887	6	3
Demurrer to counter-claim, filed February 28, 1887	9	5
Findings of fact and conclusion of law, filed May 2, 1887	10	5
Opinion of the court	11	7
Judgment of the court	17	13
Application of claimant for and allowance of appeal	18	13
Certificate	19	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 5, 1891.

1 In the Court of Claims.

WILLIAM P. DUNWOODY
vs.
THE UNITED STATES. } No. 15226.

I.—*Petition. Filed August* 18, 1886.

To the honorable the Court of Claims:

The claimant, William P. Dunwoody, respectfully shows to this honorable court:

1. The claimant was on the 5th day of April, in the year 1879, appointed chief clerk of the National Board of Health, and immediately entered upon his duties as such chief clerk, and performed the same till the 5th day of November, in the year 1884. Upon the passage of the act of Congress entitled "An act to provide office rooms for the National Board of Health, and for the publication of its reports and papers, and for other purposes," approved July 1, 1879, the claimant, as chief clerk, immediately gave bond as disbursing agent of said board, pursuant to section 5 of said act, whereby he became entitled to the sum of three hundred dollars ($300) a year in addition to the salary as chief clerk, which salary as chief
2 clerk was fixed at three thousand dollars ($3,000) a year, independent of the three hundred dollars ($300) as disbursing agent, by an order of said board made in the year 1881 and which has ever since continued in force. But, notwithstanding said section, he, owing to the insufficiency of appropriations, was not paid by the United States anything for his services, either as chief clerk or disbursing agent, from the 1st day of July, in the year 1883, to the 5th day of November, in the year 1884, although during that period he was chief clerk of said board and performed the duties of the office, and also acted as disbursing agent of said board and disbursed all sums of money which the officers of the Treasury Department would place in his hands for disbursement. Said salary of three thousand three hundred dollars ($3,300) a year for the aforesaid period of one year four months and five days amounts to four thousand four hundred and forty-two dollars and seventy-seven cents ($4,442.77), which amount he claims.

2. Subsequently, on the 20th day of October, in the year 1884, the claimant was appointed a member of said National Board of Health, being one of the members appointed from civil life, and has from that date continued to be a member of said board, and has been actually engaged in the performance of his duties as such from the 5th day of November, in the year 1884, to the present time, and as such member, and as having been actually engaged in the performance of his duties as such, he has become entitled to the compensation of ten dollars ($10) *per diem* provided by the first section of the act entitled "An act to prevent the introduction of infectious or contagious diseases into the United States, and to establish a National Board of Health," approved March 3, 1879. He has, however, owing

to insufficient appropriations, received no salary as a member
3 of said board from the 1st day of March, in the year 1885, to and including the 30th day of June, in the year 1885, nor from the 12th day of May, in the year 1886, to the 30th day of June, 1886. He therefore claims pay at the rate of ten dollars ($10) a day from the 1st day of March, 1885, to the 30th day of June, 1885, and from the 12th day of May, 1886, to the 30th day of June, 1886, being a total of one hundred and seventy-one (171) days, for which he is entitled to the sum of one thousand seven hundred and ten dollars ($1,710), which amount he claims.

3. Immediately upon the appointment of the claimant as a member of the National Board of Health he was appointed by said board its secretary, and has continued to be such secretary, and actually performed duty as such from the 5th day of November, 1884, to the present time. During the whole of said period an order, duly made by said board with the approval of the Secretary of the Treasury, has been in force fixing the pay of said secretary at the rate of one hundred dollars ($100) a month, in addition to his pay as a member of the board. By such order this claimant became entitled to receive the sum of one hundred dollars ($100) a month from said 5th day of November, 1884, to the present time, but has not received the same or any part thereof. Said amount of one hundred dollars ($100) a month for the period from the 5th of November, 1884, to the 31st of July, 1886, being one year eight months and twenty-seven days, amounts to two thousand and ninety dollars ($2,090), which amount he claims.

No action has been had on this claim in Congress or by any of the departments.

The claimant is the sole owner of this claim and the only person interested therein, and no assignment or transfer of this claim or of any part thereof or interest therein has been made.

4 The claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The claimant is a citizen of the United States and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true; and the claimant demands judgment for eight thousand two hundred and forty-two dollars and seventy-seven cents ($8,242.77).

GEORGE A. KING,
Attorney for Claimant.

William P. Dunwoody, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true to the best of my knowledge and belief.

WILLIAM P. DUNWOODY.

Subscribed and sworn to before me this 18th day of August, 1886.

[SEAL.] JOHN RANDOLPH,
Ass't Cl'k C. C.

5 II.—*Traverse. Filed September* 22, 1888.

And now comes the Attorney General on behalf of the United States and, answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
Ass't Attorney General.

6 III.—*Counter-Claim. Filed by Defendants February* 23, 1887.

Now comes the Attorney General on behalf of the United States and, for a further plea, says that at and before the institution of this suit the claimant was and still is indebted to the defendants in the just and full sum of $11,391.21, and that said sum has not been paid to defendants or any part thereof, the said sum being for that amount of public moneys appropriated by Congress for the expenses of the National Board of Health and not intended for the payment therefrom of any salary or personal compensation; which sum of money the claimant appropriated to his own use, contrary to the express prohibitions of law, by paying the same to himself for personal compensation as chief clerk of the National Board of Health and as disbursing agent; which moneys came into his hands and possession while acting as a disbursing
7 agent of the Treasury Department, he having been appointed as such agent, "without pay," by the head of the Treasury Department and without authority of law.

The items comprising said sum of $11,391.21 are as follows:

(1.) Amount of salary as chief clerk, at the rate of $1,200 per annum, from April 4, 1879, to May 31, 1879, both dates included	$191 21
(2.) Amount of salary as chief clerk, at the rate of $2,000 per annum from June 1, 1879 to December 31, 1880, both dates included	3,000 00
(3.) Amount of salary as chief clerk, at the rate of $3,000 per annum, from January 1, 1881, to June 30, 1882, both dates included	4,500 00
(4.) Amount of salary as chief clerk, at the rate of $2,500 per annum, from July 1, 1883, to June 30, 1884, both dates included	2,500 00

(5.) Amount of salary, at the rate of $300 per annum, as disbursing agent, from July 1, 1879, to June 30, 1883, both dates included	1,200 00
Total amount so misappropriated	11,391 21
(6.) For money appropriated by Congress for the secretary of the board as disbursing agent for the fiscal year ending June 30, 1883	300 00
(7.) For salary as chief clerk for the 4th day of April, 1869, being payment to claimant at the rate of $1,200 per annum before date of his appointment	3 25
8 (8.) For difference in salaries as chief clerk for first eleven days in June, 1879, at the rate of $1,200 and $2,000 per annum, caused by payment of the latter rate before salary was increased to it	24 18
(9.) For difference in salaries as chief clerk for January, 1881, and first three days in February, 1881, at the rates of $2,000 and $3,000 per annum, caused by payment of latter rate before salary was increased to it	94 43
Total extra pay	121 96

Item 6 is included in item 5. Item 7 is included in item 1. Item 8 is included in item 2. Item 9 is included in item 3.

Wherefore, by reason of said misappropriations of the public moneys by the claimant, defendants claim the right to recover the sum of $11,391.21 against the plaintiff in this suit, together with interest thereon from the dates of the several misappropriations, at the rate of 6 per centum per annum, and pray judgment therefor.

ROBERT A. HOWARD,
Assistant Attorney General.

9 IV.—*Demurrer to Counter-Claim. Filed by Claimant February 28, 1887.*

Now comes the claimant, William P. Dunwoody, and says that the plea of counter-claim of the United States and the matters therein contained, in manner and form as the same are pleaded and set forth, are not sufficient in law for the said United States to have and maintain its said counter-claim against the said William P. Dunwoody, and that the said William P. Dunwoody is not bound by the law of the land to reply to the same; and this the said William P. Dunwoody is ready to verify. Wherefore, for want of a sufficient plea of counter-claim in this behalf, the said William P. Dunwoody

prays judgment if the said United States ought to have or maintain its aforesaid counter-claim against him.

GEORGE A. KING,
Attorney for Claimant.

V.—*Findings of Fact and Conclusion of Law. Filed by the Court May* 2, 1887.

This case having been heard by the Court of Claims, the court, upon the evidence, find the facts to be as follows:

I.

April 5, 1879, claimant was appointed by the National Board of Health the chief clerk of that board, with compensation at the rate of $100 per month, dating from April 3, 1879. June 5, 1879, he was nominated by the board to the Secretary of the Treasury as disbursing clerk of the board. June 6, 1879, the acting Secretary of the Treasury sent claimant the following communication:

Upon the recommendation of the National Board of Health, you are hereby appointed a disbursing agent of this department for the purpose of disbursing the funds appropriated by Congress for the National Board of Health—this appointment to be without compensation. You will be requested to furnish a bond, with two or more sureties, in the penal sum of $20,000.

Claimant duly furnished the bond. June 12, 1879, the said board fixed the salary of claimant as chief clerk at $2,000 per annum, beginning June 1.

February 4, 1881, claimant's salary as chief clerk was increased to $3,000 per annum, to date from the 1st of the preceding January. Claimant performed duty as chief clerk and disbursing agent until November 5, 1884, but received no compensation from the United States, either as chief clerk or disbursing agent, after July 1, 1883.

II.

October 20, 1884, the President, during a recess of the Senate, appointed claimant in the usual form a member of the National Board of Health. December 4, 1884, the President, by and with the advice and consent of the Senate, appointed claimant a member of the National Board of Health. Claimant when so appointed was in civil life. He has never resigned from said board, nor been suspended or removed from it. He has received no compensation as a member of the board from March 1, 1885, to and including June 30, 1885, or from May 12, 1886, to the 30th June, 1886, being 171 days.

III.

Immediately upon the appointment of claimant as member of the National Board of Health he was appointed by said board its secretary, and has continued to be its secretary and performed
11 duty as such from November 5, 1884, to the filing of the peti-

tion herein. An order was made by the board, approved by the Secretary of the Treasury and not since revoked, fixing the secretary's pay at the rate of $100 per month, in addition to his pay as a member of the board. He has received no compensation for the performance of the duties of secretary. No meeting of the National Board of Health has been held since November, 1884, but claimant has been regularly to the office of the board and attended to his duties as secretary.

IV.

The defendants object to the following payments made to the claimant:

(1.) Amount of salary as chief clerk, at the rate of $1,200 per annum, from April 4, 1879, to May 31, 1879, both dates included	$191 21
(2.) Amount of salary as chief clerk, at the rate of $2,000 per annum, from June 1, 1879, to December 31, 1880, both dates included	3,000 00
(3.) Amount of salary as chief clerk, at the rate of $3,000 per annum, from January 1, 1881, to June 30, 1882, both dates included	4,500 00
(4.) Amount of salary as chief clerk, at the rate of $2,500 per annum, from July 1, 1883, to June 30, 1884, both dates included	2,500 00
(5.) Amount of salary, at the rate of $300 per annum, as disbursing agent, from July 1, 1879, to June 30, 1883, both dates included	1,200 00
Total amount so misappropriated	11,391 21
(6.) For money appropriated by Congress for the secretary of the board as disbursing agent for the fiscal year ending June 30, 1883	300 00
(7.) For salary as chief clerk for the 4th day of April, 1869, being payment to claimant at the rate of $1,200 per annum, before date of his appointment	3 25
(8.) For difference in salaries as chief clerk for first eleven days in June, 1879, at the rate of $1,200 and $2,000 per annum, caused by payment of the latter rate before salary was increased to it	24 18
(9.) For difference in salaries as chief clerk for January, 1881, and first three days in February, 1881, at the rates of $2,000 and $3,000 per annum, caused by payment of latter rate before salary was increased to it	94 43
Total extra pay	121 96

Item 6 is included in item 5. Item 7 is included in item 1. Item 8 is included in item 2. Item 9 is included in item 3.

Conclusion of Law.

Upon the foregoing facts the court find as conclusion of law that the counter-claim and the petition be dismissed.

VI.—*Opinion of the Court.*

DAVIS, *J.*, delivered the opinion of the court:

The National Board of Health was established by an act approved March 3, 1879 (Supp. to Rev. Stat., § 480, and 20 Stat. L., 484), which provided for seven members to be appointed by the President, by and with the advice and consent of the Senate, whose compensation "during the time when actually engaged in the performance of their duties" was to be $10 *per diem* each and reasonable expenses. Certain officers of the Government were also to participate in the work without compensation, and the duties of the board were defined as being to obtain information upon all matters affecting the public health; to advise the several departments of the Government, the executives of the several States, and the Commissioners of the
12 District of Columbia on all questions submitted to them, or whenever in the opinion of the board such advice may tend to the preservation and improvement of the public health. The act also contained other provisions not important for our present purpose.

The next statute on this subject was approved June 2, 1879 (Supp. to Rev. Stat., § 485, and 21 Stat. L., 5); this was a national quarantine act and empowered the Board of Health to render aid to State and local boards of health and to local quarantine stations in carrying out their rules and regulations to prevent the introduction and spread of contagious and infectious diseases. The eighth section of this statute appropriated $500,000 "to meet the expenses to be incurred in carrying out [its] provisions," to be disbursed under the direction of the Secretary of the Treasury on estimates to be made by the Board of Health and approved by him, while the tenth section provided that the act should "not continue in force for a longer period than four years"—that is, longer than June 2, 1883.

Another act, of July 1, 1879, after making appropriation for the rental of offices, for the printing and binding of reports, and for the services of a stenographer, provided that (Supp. to Rev. Stat., § 500, and 21 Stat. L., 46):

The chief clerk of the National Board of Health shall act as disbursing agent for the board, and shall give bond, conformably to section one hundred and seventy-six of the Revised Statutes, for the faithful performance of that duty, and for that service he shall receive three hundred dollars per annum in addition to his salary as chief clerk, and the Board of Health may, with the approval of the Secretary of the Treasury, pay to its secretary such sum, in addition

to his pay as member of the board, as it may deem proper, not exceeding one hundred dollars per month.

In this act for the first time is any mention made of a chief clerk, yet claimant had been appointed to that position the 5th of the preceding April and had since performed its duties. After the passage of this act claimant qualified as disbursing officer. In October, 1884, claimant received a recess appointment as a member of the board, which was replaced in December by an appointment by and with the advice and consent of the Senate, and he was appointed and acted as secretary of the board and as its disbursing agent. Congress having failed to appropriate at various times money to compensate claimant for his services, he demands in this action sums alleged to be due him as chief clerk, disbursing agent, secretary, and a member of the board.

The seventh section of the act last cited contained a provision "that all the moneys hereinbefore authorized to be expended, and all contracts made and liabilities incurred by the National Board of Health, shall be paid out of the appropriation of $500,000 made in the act of Congress" approved June 2, 1879.

The sundry civil act approved June 16, 1880, contained a provision "for salaries and expenses of the National Board of Health, and to carry out the purposes of the various acts creating the National Board of Health, seventy-five thousand dollars or so much thereof as is necessary," coupled with the provision that $25,000 of the $500,000 appropriation of June 2, 1879, should "be applied to the same purposes" (21 Stat. L., p. 266). The next sundry civil act, approved March 3, 1881 (21 Stat. L., p. 442), contains an appropriation of $75,000 made in the same words, with the provision that $50,000 of the appropriation of June 2, 1879, should be applied to the same purposes, "and no more money shall be expended for the above purposes out of any appropriations heretofore made or by virtue of any previous law."

13 The next sundry civil bill, approved August 7, 1882 (22 Stat. L., p. 315), contains the first specific allowance for clerk hire found in the laws. This act makes the following provision:

For salaries and expenses of the National Board of Health as follows:

For pay and expenses of the members of the National Board of Health, $10,000. For pay of secretary and disbursing agent, and pay of clerks, messengers, and laborers, $5,500. For rent, light, fuel, furniture, stationery, telegrams, and postage, $2,000. For miscellaneous expenses, $500.

The act prohibited the expenditure of other public money than that therein appropriated for the purposes of the Board of Health, and limited the duties of the board to the diseases of cholera, smallpox, and yellow fever.

The sundry civil act approved March 3, 1883, made the single appropriation of $10,000 for compensation and personal expenses of members of the board (22 Stat. L., p. 613). No appropriation appears in the sundry civil bill of the succeeding year, but the deficiency bill contains an appropriation for salary of the secretary of the board from April 1, 1884, to March 1, 1885, $3,135 (23 Stat. L., p.

452); also for pay of messenger and for rent. No appropriation has since been made for the National Board of Health, except a small balance of $60 allowed by the First Comptroller and contained in a deficiency bill (24 Stat. L., p. 289).

To the claimant's demand the Government interposes a counterclaim based upon the following theory:

That the payment of salary as chief clerk was not authorized or permitted by law, and that as the Secretary of the Treasuay coupled the designation as disbursing officer with the condition that the duties should be discharged "without pay," all moneys received by claimant in either capacity are recoverable by the United States.

The act of March 8, 1879, establishing the board placed upon them duties of a nature necessarily involving the employment of clerical assistance. They were to make examinations and investigations, to frame rules and regulations, to obtain information, to give advice, to consult with the principal sanitary organizations, to report to Congress a full statement of their transactions, together with a plan for a national public health organization, and for all those duties a sum of money was appropriated "to pay the salaries and expenses of said board and to carry out the purposes of this act."

The duties of the board clearly required the employment of clerks, and when Congress appropriates money to pay expenses it must be assumed to mean those expenses which are necessarily incident to the work directed to be done. Where a duty is placed upon an officer the performance of which necessarily involves travel, or clerk hire, or office rent, then a broad provision for expenses will include the cost of such travel, clerk hire, or office rent. But this case is even stronger, for after claimant had been appointed, after he had for some four months been performing the duties of chief clerk, Congress recognized his official position and impliedly approved the payment to him of a salary when it directed that he should also act as disbursing agent and receive pay for that service "in addition to his salary as chief clerk."

Nor was the money received by him as disbursing agent while also acting as chief clerk improperly paid, for the appropriating statute placed no discretion either in the Secretary of the
14 Treasury or in the Board of Health on the subject. It says, "shall receive three hundred dollars per annum in addition to his salary as chief clerk," not "may" receive, nor "shall receive in the discretion of the Secretary of the Treasury;" but its form is mandatory, and the Secretary could not change it without the assent of claimant. The fact that payment was regularly made on this account from July 1, 1879, to June 30, 1883, shows not only that claimant did not agree to waive his statutory right, but furnishes a consistent and contemporaneous construction of the agreement by the Treasury Department extending over four years—a construction favorable to the claimant's contention here. No argument adverse to the claimant can be drawn from the provisions of section 176 of the Revised Statutes, conformably to which claimant was to give bond as disbursing agent. It is true that the section provides for the appointment as disbursing agent of fourth-class clerks only, but

that condition was changed in this instance by the express command of Congress, contained in the act of July 1, 1879, directing that claimant should be appointed such agent, and that his bond should be furnished "conformably" to section 176—that is, it should follow section 176 as nearly as the altered circumstances of the case would permit.

Nor do we agree with the defendants that section 3679 of the Revised Statutes applies to this case; this section prohibits any department from making an expenditure in one fiscal year of a sum in excess of appropriations made for that year, or from involving the Government in any contract for the future payment of money in excess of such appropriations. The facts do not show that either of these prohibited acts was committed.

Section 3682 forbids the use of money appropriated for contingent, incidental, or miscellaneous purposes for official or clerical compensation, and this is the only section relied on by defendants which seems to us to touch this case. The adjectives contingent, incidental, and miscellaneous, as used in appropriation bills to qualify the word expenses, have a technical and well-understood meaning. It is usual for Congress to name the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor and unimportant disbursements incidental to any great business which cannot well be foreseen and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of "Contingent expenses," or "incidental expenses," or "miscellaneous expenses." Such appropriations the law says shall not be used for clerk hire; so in the appropriation act of 1882 (*supra*) Congress appropriated for pay and expenses of members of the board; for pay of secretary and disbursing agent; for pay of clerks, messengers, and laborers; for rent, light, fuel, stationary, telegrams, and postage, and for "miscellaneous expenses." It is clear that, specific appropriation being made for clerks, messengers, laborers, rent, light, fuel, stationery, telegrams, and postage, no disbursement can be made for any such expense from the appropriation for "miscellaneous expenses," which covers non-enumerated petty disbursements necessarily made in performance of the duties imposed by law. Claimant, however, was not paid under a statute similar in form to this. The act of March 3, 1879, made an appropriation "to pay the salaries and expenses of [the] board and to carry out the purposes of [the] act," not the contingent, incidental, or miscellaneous expenses incurred by the board, but the expenses, and the expenses necessary to carry out the purposes of the act. Clerk hire was a necessary expense for this purpose.

The act of June 2, 1879, which places important duties upon the Board of Health, duties which could not be performed without clerical assistance, appropriates $500,000 to meet the expenses to be "incurred in carrying out" its provisions. Congress, in the act of July 1, 1879, giving the claimant pay as disbursing agent "in addition to his salary as chief clerk," recognized and approved his appointment and the payment to him of salary, while the Treasury Department

has followed the same course during the years when money was available from which to pay him.

We are of opinion that the Government cannot recover back the moneys paid claimant, and the counter-claim will be dismissed.

The claimant's demands are embraced in four separate heads: Salary as chief clerk, salary as disbursing agent, salary as secretary of the board, and salary as a member of the board. As to these it will be noticed that the only office created by law with a compensation fixed by law is that of member of the board. The chief clerk was an officer created by the board itself, not by Congress; his salary was fixed by the board and not by Congress, and was payable out of a general fund appropriated for expenses. The claim therefor does not fall within the principles of Langston's case (118 U. S. R., 389; 21 C. Cls. R., 10), but is more similar to Mitchell's case (109 U. S. R., 146). A fund was given the board to disburse; under this power the claimant was employed; but his right to salary could not extend further than the appropriations made from time to time by Congress, and when Congress ceased to appropriate he was without claim to further compensation. He did not hold an office, but was an employé whose only right to compensation rested on the appropriation acts.

Nor do we consider that any statutory office of disbursing agent was created by the act of July, 1879 (21 Stat. L., 46). That act directed the chief clerk to act as disbursing officer, but the wording of the law does not seem to indicate a purpose of Congress to create an office, as was done in Langston's case, but to give authority to a designated individual to perform a certain class of service for a compensation fixed.

There is no provision of law establishing the position of secretary of the board, although section 5 of the act of July 1, 1879 (Supp. to Rev. Stat., § 500, and 21 Stat. L., 46), authorizes the Board of Health, with the approval of the Secretary of the Treasury, to pay its secretary such sum in addition to his pay as a member of the board as it may deem proper, not exceeding $100 per month.

The statute creating the board, that of March 3, 1879 (Supp. to Rev. Stat., § 480, and 20 Stat. L., 848), provides—

That there shall be established a National Board of Health, to consist of seven members, to be appointed by the President, by and with the advice and consent of the Senate, * * * whose compensation, during the time when actually engaged in the performance of their duties under this act, shall be $10 *per diem* each and reasonable expenses.

Under the principle of Langston's case this is the creation by statute of an office with a fixed compensation, which claimant is entitled to receive unless some action by Congress has deprived him of that right. The Supreme Court has announced as law—

That a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed
16 abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that

expressly or by clear implication modified or repealed the previous law. (Langston's case, *supra.*)

The Supreme Court has also said :

The whole question depends on the intention of Congress as expressed in the statutes. Whether a simple failure by Congress to appropriate any or a sufficient sum to pay the salary of an officer fixed by previous law is of itself an expression of purpose by Congress to reduce the salary, we do not now decide. That is not this case. On the contrary, in this case Congress has in other ways expressed its purpose to reduce for the time being the salaries of the interpreters. This purpose is, of course, irreconcilable with the provisions of the Revised Statutes on the same subject ; and those provisions must be considered as having been suspended until they were finally repealed. * * * As the appellee has been paid in full his salary as fixed by the later acts, which were in force before and during and continued in force after his term of service, he has no cause of action against the United States. (Mitchell's case, 109 U. S., 146.)

While the act of March, 1879, organizing the board, created offices, the subsequent legislation of Congress develops a policy at variance with the theory upon which the board was brought into existence. The quarantine act of June, 1879, out of which much of the expense was paid, terminated by express terms in June, 1883. The act of July, 1879, charged all expenditures of the board to the fund provided in the quarantine act of the June preceding the act last referred to, while the act of March 3, 1881 (21 Stat. L., p. 442), after providing for the salaries and expenses of the National Board of Health and for carrying out the various acts creating it, contains this significant clause : " And no more money shall be expended for the above purposes out of any appropriation heretofore made or by virtue of any previous law ; " and the act of August 7, 1882 (22 Stat. L., p. 315), prohibits the expenditure for the purposes of the Board of Health of other public moneys than as therein appropriated. Whatever rights existed in the members of the board by virtue of the organizing act were taken away when these acts were approved by the President. From that day on the board became subject to such grants as Congress might from time to time make in appropriation bills, and its members were divested of any continuing right in law. The provision is broad and explicit : " No more money shall be expended for the above purposes "—that is, for salaries and expenses of the board—and this prohibition not only covers any appropriation heretofore made, but also any expenditures that might be made " by virtue of any previous law." The course of legislation in regard to this board shows a change of policy on the part of Congress and an intention to place the members of the board and its expenses within the control of the annual appropriation bills.

The petition and the counter-claims are dismissed.

17 VII.—*Final Judgment of the Court.*

At a Court of Claims held in the city of Washington on the second day of May, A. D. 1887, judgment was ordered to be entered as follows:

The court, upon due consideration of the whole case, both for and against the claimant and the defendants, upon the petition of the claimant, find for the defendants; and upon the counter-claim of the defendants, find for the claimant, and do order, adjudge, and decree that the petition and the counter-claim be dismissed.

18 VIII.—*Application of Claimant for and Allowance of Appeal.*

WILLIAM P. DUNWOODY
v.
THE UNITED STATES. } No. 15226.

From the judgment rendered in the above-entitled cause on the second day of May, A. D. 1887, in favor of the defendants the claimant, William P. Dunwoody, by his attorney of record, George A. King, on the 30th day of July, 1887, makes application for and gives notice of an appeal to the Supreme Court of the United States.

GEORGE A. KING,
Attorney for Claimant.

Continued to February 13, 1888, and then allowed in open court.

WILLIAM A. RICHARDSON,
Chief Justice.

19 In the Court of Claims.

WILLIAM P. DUNWOODY
vs.
THE UNITED STATES. } 15226.

I, John Randolph, assistant clerk of the Court of Claims, do certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of claimant for and allowance of an appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 24th day of February, A. D. 1888.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: No. 156. Court of Claims. William P. Dunwoody, appellant, *vs.* The United States. Filed October 5, 1888.

Office Supreme Court U. S.
FILED.
SEP 29 1891
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 156.

WILLIAM P. DUNWOODY,
Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

GEORGE A. KING,
Attorney for Appellant.

H. L. McQUEEN, PRINTER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

WILLIAM P. DUNWOODY, Appellant,
v.
THE UNITED STATES. } No. 156.

BRIEF FOR APPELLANT.

I.—Statement of the Case.

This is a claim arising out of services rendered by the appellant, first as chief clerk and disbursing agent of the National Board of Health, and afterwards as member and secretary of that Board. The claim is for salary as chief clerk and disbursing agent from July 1, 1883, to November 5, 1884, at the rate of $3,000 a year as chief clerk, and $300 a year as disbursing agent; for a *per diem* of $10 as member of the Board from March 1, 1885, to June 30, 1885, and from May 12, 1886, to June 30, 1886; and for salary as secretary, at the rate of $100 a month, from November 5, 1884, to July 31, 1886.

As the case involves the discussion of several acts of Congress relating to the National Board of Health, we insert in full all of those acts material to the case:

"An act to prevent the introduction of infectious or contagious diseases into the United States, and to establish a National Board of Health. (20 Stat. L. 484.)

"*Be it enacted, etc.*, That there shall be established a National Board of Health to consist of seven members, to be appointed by the President, by and with the advice and consent of the Senate, not more than one of whom shall be appointed from any one State, whose compensation, during the time when actually engaged in the performance of their duties under this act, shall be ten dollars per diem each and reasonable expenses, and of one medical officer of the Army, one medical officer of the Navy, one medical officer of the Marine Hospital Service, and one officer from the Department of Justice, to be detailed by the Secretaries of the several Departments and the Attorney General, respectively, and the officers so detailed shall receive no compensation. Said board shall meet in Washington within thirty days after the passage of this act and in Washington or elsewhere from time to time upon notice from the president of the board, who is to be chosen by the members thereof, or upon its own adjournments, and shall frame all rules and regulations authorized or required by this act, and shall make or cause to be made such special examinations and investigations at any place or places within the United States, or at foreign ports, as they may deem best, to aid in the execution of this act and the promotion of its objects.

"SEC. 2. The duties of the National Board of Health shall be to obtain information upon all matters affecting the public health, to advise the several departments of the government, the executives of the several States, and the Commissioners of the District of Columbia, on all questions submitted by them, or whenever in the opinion of the board such advice may tend to the preservation and improvement of the public health.

"SEC. 3. That the Board of Health with the assistance of the Academy of Science, which is hereby requested and directed to co-operate with them for that purpose, shall report to Congress at its next session a full statement of its transactions, together with a plan for a national public health organization, which plan shall be prepared after consultation with the principal sanitary organizations and the sanitarians of the several States of the United States, special attention being given to the sub-

ject of quarantine, both maritime and inland, and especially as to regulations which should be established between State or local systems of quarantine and a national quarantine system.

"SEC. 4. The sum of fifty thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay the salaries and expenses of said board and to carry out the purposes of this act.

"Approved March 3, 1879."

"An act to prevent the introduction of contagious or infectious diseases into the United States." (21 Stat. 5.)

Sections 1 and 2 of this act provide regulations in regard to the inspection of vessels arriving from foreign ports where any infectious or contagious diseases exist, prescribe penalties for violation of such regulations, and authorize the President to detail medical officers upon the request of the National Board of Health to serve in the office of the consul at any foreign port for the purpose of making the inspection, etc., required by the act.

"SEC. 3. That the National Board of Health shall cooperate with and, so far as it lawfully may, aid State and municipal boards of health in the execution and enforcement of the rules and regulations of such boards to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, and into one State from another; and at such ports and places within the United States as have no quarantine regulations under State authority where such regulations are, in the opinion of the National Board of Health, necessary to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, or into one State from another; and at such ports and places within the United States where quarantine regulations exist under the authority of the State, which, in the opinion of the National Board of Health, are not sufficient to prevent the introduction of such diseases into the United States, or into one State from another, the National Board of Health shall report the facts to the President of

the United States, who shall, if, in his judgment, it is necessary and proper, order said Board of Health to make such additional rules and regulations as are necessary to prevent the introduction of such diseases into the United States from foreign countries, or into one State from another, which, when so made and approved by the President, shall be promulgated by the National Board of Health and enforced by the sanitary authorities of the States, where the State authorities will undertake to execute and enforce them; but if the State authorities shall fail or refuse to enforce said rules and regulations the President may detail an officer or appoint a proper person for that purpose.

"The Board of Health shall make such rules and regulations as are authorized by the laws of the United States and necessary to be observed by vessels at the port of departure and on the voyage where such vessels sail from any foreign port or place at which contagious or infectious disease exists, to any port or place in the United States, to secure the best sanitary condition of such vessel, her cargo, passengers, and crew, and when said rules and regulations have been approved by the President they shall be published and communicated to, and enforced by, the consular officers of the United States: *Provided*, That none of the penalties herein imposed shall attach to any vessel or any owner or officer thereof, till the act and the rules and regulations made in pursuance thereof shall have been officially promulgated for at least ten days in the port from which said vessel sailed.

"SEC. 4. It shall be the duty of the National Board of Health to obtain information of the sanitary condition of foreign ports and places from which contagious and infectious diseases are or may be imported into the United States, and to this end the consular officers of the United States at such ports and places as shall be designated by the National Board of Health shall make to said Board of Health weekly reports of the sanitary condition of the ports and places at which they are respectively stationed, according to such forms as said Board of Health may prescribe; and the Board of Health shall also obtain, through all sources accessible, including State and mu-

nicipal sanitary authorities throughout the United States, weekly reports of the sanitary condition of ports and places within the United States; and shall prepare, publish, and transmit to the medical officers of the Marine Hospital Service, to collectors of customs, and to State and municipal health officers and authorities, weekly abstracts of the consular sanitary reports and other pertinent information received by said board; and shall also, as far as it may be able, by means of the voluntary co-operation of State and municipal authorities, of public associations and private persons, procure information relating to the climatic and other conditions affecting the public health; and shall make to the Secretary of the Treasury an annual report of its operations, for transmission to Congress, with such recommendations as it may deem important to the public interests; and said report, if ordered to be printed by Congress, shall be done under the direction of the board.

"SEC. 5. That the National Board of Health shall from time to time issue to the consular officers of the United States and to the medical officers serving at any foreign port, and otherwise make publicly known, the rules and regulations made by it and approved by the President, to be used and complied with by vessels in foreign ports for securing the best sanitary condition of such vessels, their cargoes, passengers, and crews, before their departure for any port in the United States, and in the course of the voyage; and all such other rules and regulations as shall be observed in the inspection of the same on the arrival thereof at any quarantine station at the port of destination, and for the disinfection and isolation of the same, and the treatment of cargo and persons on board, so as to prevent the introduction of cholera, yellow fever, or other contagious or infectious diseases; and it shall not be lawful for any vessel to enter said port to discharge its cargo or land its passengers except upon a certificate of the health officer at such quarantine station, certifying that said rules and regulations have in all respects been observed and complied with, as well on his part as on the part of said vessel and its master, in respect to the same and to its cargo, passengers and crew; and

the master of every such vessel shall produce and deliver to the collector of customs at said port of entry, together with the other papers of the vessel, the said certificates required to be obtained at the port of departure, and the certificate herein required to be obtained from the health officer at the port of entry.

"SEC. 6. That to pay the necessary expenses of placing vessels in proper sanitary condition, to be incurred under the provisions of this act, the Secretary of the Treasury be, and he hereby is, authorized and required to make the necessary rules and regulations fixing the amount of fees to be paid by vessels for such service, and the manner of collecting the same.

"SEC. 7. That the President is authorized, when requested by the National Board of Health, and when the same can be done without prejudice to the public service, to detail officers from the several departments of the government, for temporary duty, to act under the direction of said board, to carry out the provisions of this act; and such officers shall receive no additional compensation except for actual and necessary expenses incurred in the performance of such duties.

"SEC. 8. That to meet the expenses to be incurred in carrying out the provisions of this act, the sum of five hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, to be disbursed under the direction of the Secretary of the Treasury on estimates to be made by the National Board of Health, and to be approved by him. Said National Board of Health shall as often as quarterly make a full statement of its operations and expenditures under this act to the Secretary of the Treasury, who shall report the same to Congress.

"SEC. 9. That so much of the act entitled 'An act to prevent the introduction of contagious or infectious diseases into the United States," approved April twenty-ninth, eighteen hundred and seventy-eight, as requires consular officers or other representatives of the United States at foreign ports to report the sanitary condition of and the departure of vessels from such ports to the Supervising Surgeon-General of the Marine Hospital Service; and so much of said act as requires the Surgeon-General of the

Marine Hospital Service to frame rules and regulations, and to execute said act, and to give notice to Federal and State officers of the approach of infected vessels, and furnish said officers with weekly abstracts of consular sanitary reports, and all other acts and parts of acts inconsistent with the provisions of this be, and the same are hereby, repealed.

"SEC. 10. This act shall not continue in force for a longer period than four years from the date of its approval.

"Approved, June 2, 1879."

"An act to provide office rooms for the National Board of Health, and for the publication of its reports and papers, and for other purposes." (21 Stat. 46.)

Section 1 of this act authorizes the National Board of Health to procure suitable offices for the transaction of its business at a rent not exceeding $1,800 a year, and to pay past rent.

Section 2 provides that the printing of the Board shall be done at the Government Printing Office in the same manner as other public printing, at a cost not exceeding $10,000 a year.

Sections 3 and 4 provide for the printing and publication of certain specified reports, and for payment for their preparation.

"SEC. 5. That the chief clerk of the National Board of Health shall act as disbursing agent for the board, and shall give bond, conformably to section one hundred and seventy-six of the Revised Statutes, for the faithful performance of that duty, and for such service he shall receive three hundred dollars per annum, in addition to his salary as chief clerk, and the Board of Health may, with the approval of the Secretary of the Treasury, pay to its secretary such sum, in addition to his pay as a member of the board, as it may deem proper, not exceeding one hundred dollars per month.

"SEC. 6. That section three of the act approved June second, eighteen hundred and seventy-nine, entitled 'An act to prevent the introduction of contagious or infectious diseases within the United States,' be amended as follows: At the end thereof insert: 'And the Board of Health shall have power, when they may deem it necessary with the consent and approval of the Secretary of the Treasury as a means of preventing the importation of contagious or infectious diseases into the United States, or into one State from another, to erect temporary quarantine buildings and to acquire on behalf of the United States titles to real estate for that purpose, or to rent houses, if there be any suitable, at such points and places as are named in such section.'

"SEC. 7. That all the money hereinbefore authorized to be expended and all contracts made and liabilities incurred by the National Board of Health shall be paid out of the appropriation of five hundred thousand dollars made in the act of Congress entitled 'An act to prevent the introduction of contagious or infectious diseases into the United States,' approved June second, eighteen hundred and seventy-nine.

"Approved, July 1, 1879."

"An act making appropriations for the sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-one, and for other purposes. (21 Stat. 259, 266.)

"*Be it enacted, etc.*, That the following sums be, and the same are hereby, appropriated for the objects hereinafter expressed, for the fiscal year ending June thirtieth, eighteen hundred and eighty-one, namely: * * *

"National Board of Health: For salaries and expenses of the National Board of Health, and to carry out the purposes of the various acts creating the National Board of Health, seventy-five thousand dollars, or so much thereof as is necessary: *Provided*, That twenty-five thousand dollars of the appropriation made by act of June second, eighteen hundred and seventy-nine, entitled 'An act to prevent the introduction of contagious or infectious diseases into the United States,' shall be applied to the same purposes.

"For aid to local quarantine stations and for aid to local and State boards of health, to be used in case of epidemic, one hundred thousand dollars: *Provided*, That fifty thousand dollars of the appropriation made by act of June second, eighteen hundred and seventy-nine, entitled 'An act to prevent the introduction of contagious or infectious diseases into the United States,' shall be applied to the same purposes. * * *

"Approved June 16, 1880."

"An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for other purposes. (21 Stat. 435, 443.)

"*Be it enacted, etc.*, That the following sums be, and the same are hereby, appropriated for the objects hereinafter expressed, for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, namely: * * *

"National Board of Health: For salaries and expenses of the National Board of Health, and to carry out the purposes of the various acts creating the National Board of Health, seventy-five thousand dollars, or so much thereof as is necessary: *Provided*, That fifty thousand dollars of the appropriation made by act of June second, eighteen hundred and seventy-nine, entitled 'An act to prevent the introduction of contagious or infectious diseases into the United States,' shall be applied to the same purposes; and no more money shall be expended for the above purposes out of any appropriations heretofore made or by virtue of any previous law.

"For aid to local quarantine stations and for aid to local and State boards of health, to be used in case of epidemic, one hundred thousand dollars: *Provided*, That fifty thousand dollars of the appropriation made by act of June second, eighteen hundred and seventy-nine, entitled 'An act to prevent the introduction of contagious or infectious diseases into the United States,' shall be applied to the same purposes, and no money shall be expended for the above service for the fiscal year eighteen hundred and eighty-one other than that specifically appropriated by the act approved June sixteen, eighteen hun-

dred and eighty, making appropriations for sundry civil expenses of the government. * * *

"Approved March 3, 1881."

"An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eigheen hundred and eighty-three, and for other purposes. (22 Stat. 302, 315.)

"*Be it enacted, etc.*, That the following sums be, and the same are hereby, appropriated for the objects hereinafter expressed for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, namely: * * *

"For salaries and expenses of the National Board of Health as follows:

"For pay and expenses of the members of the National Board of Health, ten thousand dollars.

"For pay of Secretary and disbursing agent, and pay of clerks, messengers, and laborers, five thousand five hundred dollars.

"For rent, light, fuel, furniture, stationery, telegrams, and postage, two thousand dollars.

"For miscellaneous expenses, five hundred dollars.

"And the President of the United States is hereby authorized, in case of a threatened or actual epidemic, to use a sum not exceeding one hundred thousand dollars, out of any money in the Treasury not otherwise appropriated, in aid of State and local boards or otherwise, in his discretion, in preventing and suppressing the spread of the same.

"For aid to State and local boards of health and to local quarantine stations in carrying out their rules and regulations to prevent the introduction and spread of contagious and infectious diseases in the United States, fifty thousand dollars: *Provided*, That no other public money than that hereby appropriated shall be expended for the purposes of the Board of Health: *And provided further*, That hereafter the duties and investigations of the Board of Health shall be confined to the diseases of cholera, small-pox and yellow fever. * * *

"Approved August 7, 1882."

"An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-four, and for other purposes. (22 Stat. 603, 613.)

"*Be it enacted, etc.*, That the following sums be, and the same are hereby, appropriated for the objects hereinafter expressed for the fiscal year ending June thirtieth, eighteen hundred and eighty-four, namely: * * *

"For the National Board of Health. For compensation and personal expenses of members of the board ten thousand dollars.

"The President of the United States is hereby authorized, in case of a threatened or actual epidemic, to use a sum, not exceeding one hundred thousand dollars, out of any money in the Treasury not otherwise appropriated, in aid of State and local boards or otherwise, in his discretion, in preventing and suppressing the spread of the same and maintaining quarantine at points of danger. * * *

"Approved March 3, 1883."

"An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and eighty-five, and for prior years, and for other purposes. (23 Stat. 446, 452.)

"*Be it enacted, etc.*, That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, to supply deficiencies in the appropriations for the fiscal year eighteen hundred and eighty-five, and for other objects hereinafter stated, namely: * * *

"National Board of Health. For salary of the Secretary of the Board from April first, eighteen hundred and eighty-four, to March first, eighteen hundred and eighty-five, three thousand one hundred and thirty dollars.

"For pay of messenger from July first, eigheen hundred and eighty-four, to March thirty-first, eighteen hundred and eighty-five, three hundred dollars.

"For rent of building from July first, eighteen hundred and eighty-four, to March thirty-first, eighteen hundred and eighty-five, nine hundred dollars. * * *

"Approved March 3, 1885."

"An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes. (23 Stat. 478, 496.)

"*Be it enacted, etc.* That the following sums be, and the same are hereby, appropriated for the objects hereinafter expressed for the fiscal year ending June thirtieth, eighteen hundred and eighty-six, namely: * * *

"National Board of Health: For salaries and expenses of the National Board of Health, five thousand dollars.

"For suppression of epidemic diseases: The President of the United States is hereby authorized, in case of threatened or actual epidemic of cholera or yellow fever, to use the unexpended balance of the sum reappropriated therefor by the act approved July seventh, eighteen hundred and eighty-four, together with the further sum of three hundred thousand dollars, the same to be immediately available, in aid of State and local boards or otherwise, in his discretion, in preventing and suppressing the spread of the same and for maintaining quarantine and maritime inspections at points of danger. * * *

"Approved March 3, 1885."

"An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and eighty-six, and for prior years, and for other purposes. (24 Stat. 256, 289.)

"*Be it enacted, etc.,* That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, to supply deficiencies in the appropriations for the fiscal year eighteen hundred and eighty-six, and for other objects hereinafter stated, namely: * * *

"For salaries and expenses of National Board of Health, sixty dollars. * * *

"Approved August 4, 1886."

"An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for prior years and for other purposes. (25 Stat. 905, 912.)

"*Be it enacted, etc.*, That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, to supply deficiencies in the appropriations for the fiscal year eighteen hundred and eighty-nine; and for prior years, and for other objects hereinafter stated, namely: * * *

"National Board of Health: To pay for transportation and storage of books, records, and furniture of the National Board of Health from September first, eighteen hundred and eighty-six, to March fourth, eighteen hundred and eighty-nine, and the transportation of the same to the office of the Surgeon-General of the Army, where they shall be hereafter stored, one thousand and four hundred dollars. * * *

"Approved March 2, 1889."

April 5, 1879, about one month after the date of the original act, constituting the Board, approved March 3, 1879, *supra*, p. 2, the claimant was appointed its chief clerk, with compensation at $100 a month, to date from April 3, 1879.

June 5, 1879, he was nominated by the Board to the Secretary of the Treasury as its disbursing clerk.

June 6, 1879, the Secretary of the Treasury appointed him a disbursing agent of the Department, in which capacity he was required to furnish, and did furnish, a bond in the sum of $20,000.

June 12, 1879, his salary as chief clerk was increased to $2,000, and February 4, 1881, to $3,000.

He performed duty as chief clerk and disbursing agent until November 5, 1884, but has received no compensation from the Board in either capacity after July 1, 1883. He now claims pay as chief clerk and disbursing agent, of the Board from July 1, 1883, to November 5, 1884, at the rate of $3,000 a year as chief clerk, and $300 in addition as disbursing agent, under the provision of section 5 of the act of July 1, 1879, *supra*, p. 7. (Finding I, p. 5 of Record.)

October 20, 1884, the President, during the recess of the Senate, appointed the claimant a member of the National Board of Health, and on December 4, 1884, he was so appointed by and with the advice and consent of the Senate, being one of the members appointed from civil life.

Immediately upon his appointment as a member of the Board he was appointed its secretary, and continued to be such from November 5, 1884, to the time of the institution of this suit, August 18, 1886.

An order was made by the Board, and approved by the Secretary of the Treasury, fixing the secretary's pay at the rate of $100 a month, in addition to his pay as a member of the Board.

No meeting of the National Board of Health has been held since November, 1884, but the claimant has been regularly at the office of the Board, and attended to his duties as secretary.

He has received no compensation as a member of the Board from March 1, 1885, to and including June 30, 1885, or from May 12, 1886, to June 30, 1886, and now claims payment for those periods amounting to 171 days, at the rate of $10 a day, as provided by the first section of the organic act of the Board, approved March 3, 1879, *supra*, p. 2, amounting to $1,710.

He has never received any compensation whatever as secretary, and claims payment in that capacity from November 5, 1884, to July 31, 1886, at $100 a month as provided by section 5 of the act of July 1, 1879, *supra*, p. 7.

To his demands the United States interposed a counter-claim, insisting upon certain irregularities in his appointment and service.

The decision of the Court of Claims was adverse both

to the claim and the counter-claim. Its decision against the claim was upon the following grounds:

1. That as to the claims in the capacities of chief clerk and disbursing agent and of secretary of the Board, these were not offices established by law with salaries attached thereto, but although recognized by section 5 of the act of July 1, 1879, *supra*, p. 7, were created only by the Board itself, and were dependent for their salaries upon the appropriations made from time to time by Congress.

2. As to the claim for a per diem of $10 as member of the Board, while it was conceded that that office was created with a fixed salary by the act of March 3, 1879, *supra*, p. 2, it was decided that the provisions contained in the Sundry Civil Appropriation Acts of 1881 and 1882, respectively, cut off the right of members of the Board to their per diems, except so far as appropriations might be made from time to time by Congress, and that as the appropriations made in this instance proved insufficient, the claimant could assert no further claim.

The grounds upon which the counter-claim was overruled are immaterial here, as the Attorney-General, by taking no appeal, has declared himself satisfied with the judgment.

The case is now here on the appeal of the claimant.

II.—Assignment of Error.

The appellant hereby assigns the following error in the judgment of the Court of Claims:

That said Court held, as above stated, adversely to the several claims of the claimant as chief clerk and disbursing agent, as member of the National Board of Health, and as secretary thereof, respectively, and gave judgment dismissing his petition; whereas said Court should have held in favor of the claimant, and have given judgment

for him and against the United States for the amount claimed in his petition.

III.—Brief of Argument.

1. On the Claim as Chief Clerk and Disbursing Agent.

Neither the act of March 3, 1879, nor that of June 2, 1879, named such an officer as chief clerk of the National Board of Health. The former act, however, appropriated $50,000 to pay the salaries and expenses of the Board, and to carry out the purposes of the act, and the latter $500,000 to meet the expenses to be incurred in carrying out its provisions, *supra*, pp. 3, 6. It was under the appropriations made by these acts that the claimant was appointed, and his salary fixed, first, at $1,200 a year, next at $2,000, and finally at $3,000. Did these acts stand alone we might concede the correctness of the view taken by the Court of Claims, that the office of chief clerk of the National Board of Health was dependent solely upon the existence of appropriations made by law to meet the salaries and clerical expenses of the National Board of Health, and to carry out the purposes of its creation.

The act, however, upon which appellant relies as to this branch of his claim is that of July 1, 1879, which by its 5th section enacts as follows:

"That the chief clerk of the National Board of Health shall act as disbursing agent for the Board, and shall give bond, conformably to section 176 of the Revised Statutes for the faithful performance of that duty, and for such services he shall receive three hundred dollars per annum, in addition to his salary as chief clerk."

While this section does not in so many words provide that "there shall be a chief clerk of the National Board

of Health," it recognizes the existence of such an officer, and is plainly incapable of execution unless there is a chief clerk.

It will be admitted, we think, that the first section of the act of March 3, 1879, providing that the Board "shall frame all rules and regulations authorized or required by this act," taken in connection with the appropriation of $50,000 made by that act, and $500,000 by the act of June 2, 1879, was sufficient to authorize the Board to appoint a chief clerk, and to fix his salary within the limits of the appropriations made. Such certainly was its contemporaneous construction. When, therefore, the legislative authority by a further act prescribed certain duties for the chief clerk, it is tantamount to the legislative recognition of the existence of such an officer, with a salary fixed by the Board, and is equivalent to an express statutory provision that there shall be a chief clerk of the National Board of Health whose salary shall be fixed by the Board.

This court says in *United States* v. *Babbitt*, 1 Black, 55, 60.

"It is a rule in the construction of statutes that all relating to the same subject-matter shall be considered together;"

And further on, page 61:

"What is implied in a statute, pleading, contract, or will, is as much a part of it as what is expressed. A thing within the intention of the makers of the statute is as much within the statute as if it were within the letter."

Or, as was again said in *Bulkley* v. *United States*, 19 Wall. 37, 40,

"Such is the implication of the contract, and what is implied in a contract, deed, will, or statute, is as effect-

ual as what is expressed. Human affairs are largely conducted upon the principle of implications."

The demand for $300 a year for services as disbursing agent can hardly be said, indeed, to rest upon implication only, as the express provision of the statute is that the chief clerk when acting as disbursing agent "*shall receive* three hundred dollars per annum, in addition to his salary as chief clerk." It would be contrary to the plain mandate of the statute to deny him the compensation as disbursing agent. But it would be inconsistent to give him that, and not also his salary as chief clerk. It is difficult to perceive how he can be granted the incident without getting the principal. When the statute says that "he shall receive three hundred dollars per annum, *in addition to* his salary as chief clerk," it seems to be but a fair construction of the language to regard it as equivalent to a provision that "he shall receive three hundred dollars per annum, *and also* his salary as chief clerk."

2. On the Claim as Member of the Board.

But the demand for a per diem of $10 as member of the National Board of Health from March 1, 1885, to June 30, 1885, and from May 12, 1886, to June 30, 1886, a period of 171 days, and aggregating $1,710, rests upon no implication or inference. It is based upon the plain and positive provisions of the statute establishing the office and fixing the salary. The words of the law establishing the National Board of Health are,

"That there shall be established a National Board of Health to consist of seven members to be appointed by the President, by and with the advice and consent of the Senate, not more than one of whom shall be appointed from any one State, whose compensation during the time when actually engaged in the performance of their duties

under this act shall be $10 per diem each, and reasonable expenses," etc.

The Court of Claims concedes that

"Under the principle of *Langston's Case*, 118 U. S. 389, 394, this is the creation by statute of an office with a fixed compensation, which claimant is entitled to receive unless some action by Congress has deprived him of that right. The Supreme Court has announced as law—

"'That a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law.'"

Thus far the Court of Claims is in accord with the position taken by the claimant on this branch of the case. The denial of the salary to the claimant is based upon subsequent legislative action which, as it is claimed on the part of the United States, "expressly or by clear implication modified or repealed the previous law."

It will hardly be claimed that there is any legislation which *expressly* repeals the provision of law establishing the office of member of the National Board of Health, and attaching thereto a *per diem* compensation of $10, to be received by the member while actually engaged in the performance of duty under the act. The only defense is that an *implied* repeal is contained in subsequent statutes. The provisions claimed to constitute such repeal consist of those portions of the sundry civil appropriation acts of 1881 and 1882 which relate to the National Board of Health, cited *supra*, pp. 9, 10.

It will be borne in mind that no portion of this item of claim is for services rendered in either of the fiscal years covered by the appropriation acts in question, one of

which was for the year ending June 30, 1882, and the other for that ending June 30, 1883, whereas upon this item of the claim, all the compensation demanded begins on the first of November, 1884.

The question therefore is, do the provisions relied upon to defeat this claim constitute general legislation, or are they confined in their operation merely to the appropriations contained in those particular acts? And as connected with this question is another, viz., whether the provisions have even a temporary operation upon the salaries of members of the Board? On these questions the claimant respectfully, but with great confidence, maintains these two propositions:

1. That the proviso to the act of March 3, 1881,

"*Provided*, That no more money shall be expended for the above purposes out of any appropriations heretofore made or by virtue of any previous law,"

And the proviso to the act of August 7, 1882,

"*Provided*, That no other public money than that hereby appropriated shall be expended for the purposes of the Board of Health,"

Are solely and entirely limitations upon the expenditures of the Board *for the particular fiscal years to which the appropriation acts relate*, and have no operation beyond those years.

2. That even in their *temporary* operation during the years appropriated for in those acts, they apply only to the "*purposes*" properly so-called, of the Board, such as the establishment of quarantine stations, the printing of reports, etc., etc., and have no application to the salaries of the members of the Board itself, which are not "*purposes*" of the Board, within the intent of the acts.

Beginning now with the first of these propositions, it

will be conceded as the natural presumption, in the absence of circumstances imperatively requiring a different construction, that a proviso annexed to a temporary appropriation is a restriction and limitation only upon that one particular appropriation, and is not to be construed as general legislation. *United States* v. *Dickson*, 15 Pet. 141, 165; *Minis* v. *United States*, 15 Pet. 423, 445.

This rule is admitted in the recent case of *United States* v. *Ewing*, 140 U. S. 142, 149, and although the proviso construed in that case was held to be an exception, yet the terms in which this court stated the proposition, only serve to add force to the rule itself, and to show the propriety of its application to the present case. In that case, after an appropriation in a deficiency act for fees of commissioners, it was added,

"*Provided*, That for issuing any warrant or writ, and for any other necessary service, commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees."

This Court thus interpreted the proviso, p. 149:

"In the case under consideration, if the proviso had been simply that commissioners should not be entitled to any docket fees, we should have had little doubt that it would be held as applying only to the $50,000 appropriated in the bill; but as the proviso contains a substantial re-enactment of the clause of the Revised Statutes, § 847, fixing the fees for similar services, with the prohibition against docket fees tacked thereto as an amendment, we find it impossible to give effect to the whole proviso without construing it as expressing the intention of Congress to amend that clause of § 847."

The provision that "no more money shall be expended for the above purposes out of any appropriations hereto-

fore made or by virtue of any previous law," must be read in the light of the appropriating clause which precedes it, as well as the first clause of the proviso.

By the act of March 3, 1879, constituting the National Board of Health, the sum of $50,000 was appropriated, § 4, *supra*, p. 3, "to pay the salaries and expenses of said Board, and to carry out the purposes of this act." By that of June 2, 1879, § 8, *supra*, p. 6, the large sum of $500,000 was appropriated "to meet the expenses to be incurred in carrying out the provisions of this act." By the sundry civil appropriation act of June 16, 1880, *supra*, p. 9, a further appropriation of $75,000 had been made "for salaries and expenses of the National Board of Health, and to carry out the purposes of the various acts creating the National Board of Health." This made a total, of all appropriations which had been made by Congress prior to the date of the sundry civil act of 1881, of $625,000.

When Congress came to deal with the subject anew in 1881 it undoubtedly found these appropriations already existing much larger than in its judgment the new exigencies of the service demanded. It determined upon a consequent restraint of the Board in its expenditures for the following fiscal year. It appropriated $75,000 for the salaries and expenses of the Board, and to carry out the purposes of the various acts creating it, and also permitted the expenditure during the coming fiscal year of $50,000 out of the appropriation of $500,000 made by the act of June 2, 1879. It was to prevent the balance of the very large appropriation made by previous enactments being drawn upon during the coming fiscal year in excess of what was judged by Congress to be required by the exigencies of the service, that it was enacted that "no more money shall be expended for the above purposes out of any appropriations heretofore made or by

virtue of any previous law"—that is, that during the coming fiscal year for which this appropriation is intended, no greater sum of money shall be expended than is appropriated by this act, even though a prior law grants a larger sum. To give it any wider scope would require it to be read as if Congress had said, "No more money shall *ever* be expended for the above purposes out of appropriations heretofore made," etc., a thing obviously not in the contemplation of the legislature.

This construction is much strengthened by a reference to a subsequent paragraph of the same act, which makes an appropriation for aid to local quarantine stations, etc., to be used in case of epidemic, $100,000, and re-appropriates $50,000 of the appropriation made by act of June 2, 1879, to be applied to the same purposes, and enacts that "no money shall be expended for the above service for the fiscal year 1881 other than that specifically appropriated by the act approved June 16, 1880, making appropriations for sundry civil expenses of the government." This proviso clearly indicates the subject with which Congress regarded itself as dealing in making these appropriations, viz., the expenditures of the fiscal year to which, and to which alone, the act as indicated by its title, and its opening enacting clause, relates.

Turning to this sundry civil appropriation act of 1881, as contained in the Supplement to the Revised Statutes, 1st edition, page 604, a work prepared under authority of Congress, and purporting to contain all the legislation of a general and a permanent character from 1874 to 1881, we do not find this clause embraced in the act as printed in that volume. This omission is important, as the learned editor states in his preface, page iii, that all provisions in appropriation acts as to which there might be a difference of opinion whether they were merely of temporary character, or in the nature of general legisla-

tion, had been inserted. It must therefore have been regarded at that time as entirely free from doubt that the proviso in question was of the character of temporary legislation only, constituting a mere limitation and restriction upon the expenditures of the fiscal year.

Passing to the proviso in the next sundry civil appropriation act of 1882, relied upon by the Court of Claims in its opinion as constituting general legislation limiting the expenditures of the National Board of Health to the sums appropriated by Congress, it will at once be noted that it is in still weaker terms as general legislation than that of 1881. It is, "*Provided*, That no other public money than that hereby appropriated shall be expended for the purposes of the Board of Health," meaning, obviously and naturally, that old appropriations—having in mind especially that of $500,000 made by the act of June 2, 1879,—were not to be drawn upon, and that the appropriations made in the act were to be regarded as the sole appropriations in force for the coming fiscal year. To regard the proviso as meaning anything more than this seems to us, with due deference to the learned court below, to require an unnatural straining and stretching of its language to an object never intended or thought of by its framers.

This view is again fortified by a consideration of the subsequent proviso in the same act, and in direct sequence to this, "*And provided further*, That hereafter the duties and investigations of the Board of Health shall be confined to the diseases of cholera, small pox, and yellow fever."

The introduction into this proviso of the word "hereafter" at once determines its character as general and permanent legislation. A careful investigation of appropriation acts clearly shows that the word "hereafter" introduced into a proviso or other paragraph contained

in such acts, indicates that the provision is intended as general and permanent legislation, though without that determining word it might be regarded as temporary or of doubtful character. (Supplement to Revised Statutes, new edition, p. 670, chap. 332, note 1.)

Not only this, but the prohibition of the acts of 1881 and 1882 is only directed against the expenditure of more or other public money than that appropriated, for the "purposes" of the National Board of Health.

The payment of the regular compensation of its members was in no sense a "purpose" of the Board. The learned court below seems to have overlooked the distinction between "salaries and expenses," and "purposes," which is found in almost all the acts appropriating for this Board and its work.

The collocation of the proviso in the act of 1882 is conclusive on this point. After appropriating for pay and expenses of the members, secretary, disbursing agent, clerks, messengers, and laborers of the National Board of Health, its rent, light, fuel, furniture, stationery, telegrams, postage, and miscellaneous expenses, and after appropriating $100,000 to be used in aid of State and local boards, or otherwise in preventing or suppressing the spread of epidemics, it concludes the subject as follows:

"For aid to State and local boards of health and to local quarantine stations in carrying out their rules and regulations to prevent the introduction and spread of contagious and infectious diseases in the United States, fifty thousand dollars: *Provided*, That no other public money than that hereby appropriated shall be expended for the purposes of the Board of Health: *And provided further*, That hereafter the duties and investigations of the Board of Health shall be confined to the diseases of cholera, small-pox, and yellow fever."

The proviso plainly refers, not to the personal compensation, authorized by continuing and permanent law, of the members themselves, but to the expenditure of moneys for the "purposes" of the Board, that is in establishing quarantine stations, as referred to in the previous part of the paragraph, and aiding State and local boards of health. This view is strengthened by the latter part of the paragraph, which confines the duties and investigations of the Board of Health to the diseases of cholera, small-pox, and yellow fever. This indicates no further purpose on the part of Congress than to prevent the further establishment of quarantine stations, and to confine the duties of the Board to scientific investigation of certain contagious diseases. It would hardly be claimed that a law providing that no further money should be expended for the "purposes" of the Department of Justice would take away the right of the Attorney-General to his personal compensation fixed by permanent law. The natural meaning would rather be that further investigations dependent upon annual appropriations should not be prosecuted without further appropriations for the purpose.

With these provisos out of the way, the case is a clear one. Duties were imposed upon the Board, and it performed them. The claimant was actually engaged in the performance of those duties for 171 days, for which the law fixes $10 a day as the compensation. The failure to appropriate a sufficient sum does not cut off his right to recover it. *United States* v. *Langston*, 118 U. S. 389. In recent cases involving per diem fees of commissioners of the circuit courts, the question whether any appropriation was in force adequate to the payment of the fees has never been regarded as material. The only question considered has been, did the law require the services to be performed, and what, if any, com-

pensation did it fix? *United States* v. *Jones*, 134 U. S. 483; *United States* v. *Ewing*, 140 U. S. 142.

3. On the Claim as Secretary.

The act of July 1, 1879, § 5, *supra*, p. 7, enacted that

"The Board of Health, may, with the approval of the Secretary of the Treasury, pay to its secretary such sum, in addition to his pay as a member of the board, as it may deem proper, not exceeding one hundred dollars per month."

The claimant performed duty as secretary from November 1, 1884, to July 31, 1886, but has received no pay in that capacity. An order of the Board, approved by the Secretary of the Treasury, fixed his compensation as secretary at $100 a month, in addition to his pay as a member of the Board.

Most of our remarks on the preceding branches of the claim are applicable to this. The service has been performed under authority of law, and should be paid for.

4. Concluding Remarks.

Congress, notwithstanding its failure to appropriate for the Board for several years past, has evidently not regarded it as an extinct organization, and if the question be asked why, with the Board in existence, Congress should nevertheless have failed to appropriate for it, an answer may be found in the proceedings of Congress itself.

By reference to the proceedings of the Senate for July 20, 1886, contained in the Congressional Record, 49th Congress, 1st session, part 7, p. 7218, it will be seen that in the course of consideration of the sundry civil appropriation bill for the year ending June 30, 1887, the Senate inserted an item, "For salaries and expenses of the Na-

tional Board of Health, $10,000." That item, however, does not appear in the bill as finally agreed to by both Houses. 24 Stat. 222.

It can not be inferred from this action, however, that the House of Representatives did not recognize the Board as an existing body, for at the very same session, on the 27th of May, 1886, the House passed a joint resolution authorizing the printing of 25,000 copies of the Report of the Board for the use of the two Houses of Congress, and in addition, " 2,000 for the use of the National Board of Health," thus recognizing the Board as an existing and active organization. Cong. Rec. 49th Cong. 1st Sess. pt. 5, p. 5003. And as late as 1888 it was stated in a report made to the House by the Committee on Commerce on the subject of infectious and contagious diseases, "Congress in 1879 recognized the propriety of creating such a service and established the National Board of Health, which *still exists.*" House Report No. 498, 50th Cong. 1st Sess. p. 2.

Thus the continued existence of the Board was recognized by the two Houses of Congress down to the very time of filing the petition in this case, and by one of the committees even subsequently. Can the Government honorably recognize this Board, and allow—nay, even compel—its members and officers to continue in service, and yet refuse to pay them the stipulated compensation? We say " compel," for certain duties were laid upon the Board by law, which they were absolutely required to fulfil; its members could not, without a grave dereliction of their sworn obligations as officers of the Government, lay down their offices until others were ready to take their places. And in view of the adverse conditions under which this Board was working for some time before the institution of this suit it might have been difficult to find competent men willing to undertake so thankless a task as that laid upon the Board.

It seems to us that the Court of Claims ought to have applied to this case the rule so well stated by it in *Upton* v. *United States*, 19 C. Cls. 46, where it said, p. 49:

"When, under such a statute, by the inadvertence of a legislative committee or the mistake of an executive officer, an inadequate sum is appropriated, it is manifest that no intent to reduce the compensation can be imputed to the appropriation act; *still more apparent would this be where no appropriation whatever was made, while the office was allowed to remain and the officer to continue rendering service.*"

In this case the office was allowed to remain, the officer to continue rendering service. Nowhere from any quarter was there a request for him to resign, or any express or implied abolition of his office. Had he chosen to tender his resignation he could not have laid down the office without the consent of the President signified by the acceptance of his resignation. *Edwards* v. *United States*, 103 U. S. 471. Thus, the claimant was not only invited, but required by law to continue rendering services for which the Court of Claims now declares he has no legal claim for payment.

We submit that such views can not be sustained, and ask therefore that the judgment be reversed, and the cause remanded with directions to render a judgment in favor of the claimant.

GEORGE A. KING,
Attorney for Appellant.

Office Supreme Court U. S.
FILED,
JAN 13 1892
JAMES H. McKENNEY
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

WILLIAM P. DUNWOODY, appellant,
vs.
THE UNITED STATES.
No. 156.

BRIEF FOR THE UNITED STATES.

JOHN B. COTTON,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

WILLIAM P. DUNWOODY, appellant,
vs.
THE UNITED STATES.
No. 156.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal by Dunwoody from a judgment of the Court of Claims. August 18, 1886, the claimant filed his petition in the Court of Claims, declaring that there was due him from the United States the sum of $8,242.77 for services rendered to the defendant, as follows:

1.

For salary as chief clerk and disbursing agent of the National Board of Health from July 1, 1883, to November 5, 1884, at the rate of $3,000 a year as chief clerk and $300 a year as disbursing agent—a period of one year four months and five days $4,442.77

2.

For services as a member of the National Board of Health from March 1, 1885, to June 30, 1885, and from May 12, 1886, to June 30, 1886, one hundred and seventy-one days, at $10 per day 1,710.00

3.

For salary as secretary of the National Board of Health from November 5, 1884, to July 31, 1886, one year eight months and twenty-seven days, at $100 per month..... 2,090.00

To this claim the United States filed a general denial, and also a counterclaim, the latter alleging a wrongful appropriation of money of the defendant amounting to $11,391.21. To the counterclaim the claimant demurred.

The Court of Claims sustained the claimant's demurrer, finding nothing due Dunwoody under items 1, 2, and 3, *supra*, and dismissed the petition.

From the judgment dismissing the petition this appeal was taken by Dunwoody. No appeal was taken by the United States. The defendent thus acquiesced in the action of the Court of Claims denying the counter-claim, and the only question presented for the determination of the court is the correctness of the dismissal of the claimant's petition.

The several claims, 1, 2, and 3, grew out of Dunwoody's connection with a body known as the National Board of Health.

The National Board of Health was established by an act approved March 3, 1879. (20 Stat. L., 484.) Briefly stated, the act provided a board of seven members, to be appointed by the President, by and with the advice and

consent of the Senate, whose compensation "during the time when actually engaged in the performance of their duties," was to be $10 per diem and reasonable expenses. With the members so appointed were to be associated a medical officer of the Army, the Navy, the Marine Hospital Service, and an officer of the Department of Justice. The duties of the Board (Sec. 2) were:

> To obtain information upon all matters affecting the public health; to advise the several Departments of the Government, the executives of the several States, and the Commissioners of the District of Columbia on all questions submitted to them, or whenever in the opinion of the Board such advice may tend to the preservation and improvement of the public health.

Section 1 provides for the meetings of the Board as follows:

> Said Board shall meet in Washington within thirty days after the passage of this act, *and in Washington or elsewhere from time to time upon notice from the president of the Board, who is to be chosen by the members thereof, or upon its own adjournment*, etc.

This act was followed by that of Jan. 2, 1879 (21 Stat. L., 5). By the latter act the National Board of Health was directed to—

> Coöperate with and, so far as lawfully it may, aid State and municipal boards of health in the execution and enforcement of the rules and regulations of such boards to prevent the introduction of contagious or infectious diseases into the United States from foreign countries and into one State from another.

The act sets forth in detail the various duties of the Board, and appropriates the sum of $500,000 "to meet the expenses to be incurred in carrying out [its] provisions." This sum is to be disbursed "under the direction of the Secretary of the Treasury, on estimates to be made by the National Board of Health, and to be approved by him."

Section 10 is as follows:

> This act shall not continue in force for a longer period than four years from the date of its approval.

It was approved June 2, 1879. No change is made by this act as to the salary of the members of the National Board of Health, and no new or other offices are created. It was clearly left to the Board, both in the acts of March 3, 1879, and of June 2, 1879, to provide such agencies as were necessary and proper to carry out the purposes of the acts. For this purpose an appropriation of $50,000 was made in the first act, and of $500,000 in the second. Congress did not undertake to point out what these agencies should be. In pursuance of the power thus conferred under section 4 of the act of March 3, 1879, the National Board of Health, April 5, 1879, appointed Dunwoody chief clerk of that Board, with compensation at the rate of $100 per month from April 3, 1879. June 5, 1879, Dunwoody was nominated by the Board to the Secretary of the Treasury as its disbursing clerk. June 6, 1879, the appointment was made, "to be without compensation." June 12, 1879, after the passage of the act appropriating the sum of $500,000 "to meet the expenses to be incurred in carrying out the provisions of this act," the Board fixed

the salary of Dunwoody as chief clerk at $2,000 per annum, beginning June 1, 1879.

February 4, 1881, the Board further increased Dunwoody's salary as chief clerk to $3,000 per annum, to date from January 1, 1881. Dunwoody performed duty as chief clerk and disbursing agent until November 5, 1884, but received no compensation from the United States as such chief clerk and disbursing agent after July 1, 1883.

Dunwoody having first been appointed during a recess of the Senate a member of the National Board of Health from civil life, was, by and with the advice and consent of the Senate, appointed such a member December 4, 1884. He has never resigned from said Board, nor been suspended or removed. He has received no compensation as a member of the Board from March 1, 1885, to and including June 30, 1885, or from May 12, 1886, to June 30, 1886, being the one hundred and seventy-one days for which he seeks compensation in this action.

Dunwoody, after his appointment as a member of the Board, was by it appointed its secretary, and performed duty as secretary from November 5, 1884, to the date of filing his petition.

The Board made an order fixing the pay of the secretary at the rate of $100 per month, in addition to his pay as a member of the Board. By section 8 of the act of June 2, 1879, *supra*, this order was submitted to the Secretary of the Treasury and approved by him. Dunwoody has received no pay for the performance of the duties of secretary.

There has been no meeting of the National Board of Health since November, 1884, "but claimant has been regularly to the office of the Board and attended to his duties as secretary."

BRIEF OF ARGUMENT.

The second item in claimant's petition is a claim for a per diem of $10 for one hundred and seventy-one days, being the period from March 1, 1885, to June 30, 1885, and from May 12, 1886, to June 30, 1886.

It will be seen from a computation that claimant demands a per diem for the entire number of days included in the periods named, although during this time there are twenty-five Sundays, in which, presumably, no actual services were performed. Such claim does not sustain the equity of this suit claimed in claimants' brief. To sustain this portion of the claim there is warrant neither in law nor fact.

The act of March 3, 1879 (20 Stat. L., 484), under which alone the claimant's membership of the National Board of Health is established, in the first section, furnishes the rule upon which compensation is based:

> That there shall be established a National Board of Health, to consist of seven members, whose compensation, *during the time when actually engaged in the performance of their duties under this act*, shall be ten dollars per diem each and reasonable expenses.

In the present suit the United States is not concerned whether this act established a permanent board which is

still extant. Neither is it of consequence whether this compensation is a salary fixed by the statute. In any event, the act prescribes the condition of the payment of the per diem of $10. No per diem can be paid except "*during the time when* (the members are) *actually engaged in the performance of their duties* under this act." To entitle a member of the Board to such compensation he must show affirmatively that he was actually so engaged, and the duration of such services. This the record shows that the claimant did not do. The findings of fact by the Court of Claims not only does not show that the claimant was at any time "actually engaged in the performance of (his) duties" as a member of this Board, but in fact shows that he was not so engaged. The only facts found by the Court of Claims as to membership are found in Findings II and III. (Page 5, transcript of record.)

Finding II shows claimant's appointment from civil life; that he never resigned; that he never was suspended or removed from the Board; that he never received compensation during the period claimed in this petition. This is all. There are no facts from which even a futile imagination could infer the "actual performance of duties." It is clear the Court of Claims did not intend to find any such facts. It is equally clear that the Court of Claims has found that claimant did not "actually perform" any duties as a member of the Board. The act (January 2, 1879, *supra*) establishing the National Board of Health plainly did not contemplate a continuous service on the part of the members. This is shown from the fact that it was to consist, first, of persons taken from civil life,

presumably persons of established reputation in the special knowledge required for such service; and, secondly, from three departments of the Government three persons who had other and fixed duties which were only temporarily to be suspended. Such boards have not been uncommon in the history of the Government. The language of the act clearly shows this contention to be with the defendant. Section 1 provides:

> Said Board shall meet in Washington within thirty days from the passage of this act, and in Washington or elsewhere from time to time upon notice from the president of the Board, who is to be chosen by the members thereof, or upon its own adjournments.

The evident intent of this section is that the members of the Board were not to have separate duties to perform; but the duties were to be performed *as a board* at the various meetings authorized by the act, leaving the detail work to be carried out by such agencies as the Board was authorized to employ under section 4, which provided a fund for so doing.

The Court of Claims, in Finding III, have found that "no meeting of the National Board of Health has been held since November, 1884," the month prior to the final appointment of the claimant as a member. Counsel for claimant, on page 26 of his brief, states broadly that "the claimant was actually engaged in the performance of those duties for one hundred and seventy-one days, for which the law fixes $10 a day as compensation." He has, however, omitted to point out to this court where he finds such fact in the record. If he shall attempt to substan-

tiate this statement by inferences from the concluding portion of Finding III (transcript of record, p. 6) the answer is plain. The language is:

> No meeting of the National Board of Health has been held since November, 1884, but claimant has been regularly to the office of the Board and attended to his duties as secretary.

This finding relates to claimant's status as secretary only, and is clearly not intended to state any fact relating to membership, which is considered in the next preceding finding. The functions of the office of secretary are distinct from those of membership, have no necessary connection therewith, and could as well be performed without membership as with it. All that the finding intends is that the claimant regularly attended the office of the Board to act as secretary.

The third item of the claim is for compensation as secretary of the National Board of Health from November 5, 1884, to July 31, 1886, at the rate of $100 a month, a period of one year eight months and twenty-seven days, amounting to $2,090.

By Finding III (transcript of record, p. 5) it appears that immediately after Dunwoody's recess appointment as a member of the Board he was appointed its secretary, and performed duty as such from November 5, 1884, to the filing of the petition, August 18, 1886; that an order was made by the Board, *approved by the Secretary of the Treasury* and not since revoked, fixing the secretary's (of the Board) pay at the rate of $100 per month, in addition to his pay as a member of the Board; that he has received no compensation for the performance of the duties of sec-

retary; that he has been regularly at the office of the Board and attended to his duties as secretary; that no meeting of the Board has been held since November, 1884.

Neither the act establishing the Board (approved March 3, 1879; 20 Stat. L., 484) nor the quarantine act (approved June 2, 1879; 21 Stat. L., 5) made any mention of the specific agencies which the National Board of Health might employ in carrying out its duties. Nor is there found any other provision of law *establishing* the office of secretary of the Board.

The first mention of such officer is found in section 5 of the act entitled "An act to provide office rooms for the National Board of Health, and for the publication of its reports and papers, and for other purposes," (21 Stat. L., 46) Section 5, among other things, provides that:

> The Board of Health may, with the approval of the Secretary of the Treasury, pay to its secretary such sum, in addition to his pay as a member of the Board, as it may deem proper, not exceeding one hundred dollars per month.

The act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1883, and for other purposes (22 Stat. L., 315), among other things relating to the National Board of Health, provided:

> For pay for secretary and disbursing agent, and pay of clerks, messengers, and laborers, five thousand five hundred dollars.

The act making appropriations for sundry civil expenses of the Government for the fiscal year ending June

30, 1884, and for other purposes (22 Stat. L., 603, 613)' provided:

> For the National Board of Health: For *compensation and personal expenses of the members of the Board, ten thousand dollars.*

There was an entire omission of any appropriation for its secretary.

But in the act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1885, *and for prior years*, and for other purposes (23 Stat. L., 452), it is provided:

> National Board of Health. For salary of the secretary of the Board from April first, eighteen hundred and eighty-four, to March first, eighteen hundred and eighty-five, three thousand one hundred and thirty dollars.

In the act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1886, and for other purposes (23 Stat. L., 478, 496), it is provided:

> National Board of Health: For salaries and expenses of the National Board of Health, five thousand dollars.

Provision for the secretary is conspicuous for its absence.

In the act making appropriations to *supply deficiencies* in the appropriations for the fiscal year ending *June* 30, 1886, and for other purposes, approved *August* 4, 1886, it is provided:

> For salaries and expenses of National Board of Health, sixty dollars.

These are all the provisions of law in any way, directly or indirectly, relating to the treasurer of the National Board of Health.

The position of the claimant is that the several statutes cited "recognizes the existence of such an officer" as treasurer of the Board, and that "the service has been performed under authority of law," and therefore "should be paid for."

To the claim the defendant makes two answers.

The first answer is technical, but fully warranted in answer to a claim against the Government which the record shows to be devoid of any substantial merit and built on legal subtilties. Admitting for the argument only that the acts cited establish the existence of the office of treasurer of the National Board of Health, the claimant held such *de facto* and not *de jure*, and therefore is not entitled to recover the salary.

The act of July 1, 1879, § 5 (21 Stat. L., 46), enacted that—

> The Board of Health may, with the approval of the Secretary of the Treasury, pay to its secretary such sum, in addition to his pay as a member of the Board, as it may deem proper, not exceeding one hundred dollars per month.

This is the act which it is claimed recognized the existence of this officer. If it did so, then it is plain that no person *not at the same time a member of the Board could be its treasurer*.

The services were distinct; one could be performed while the other was not being exercised. But the two officers must be united in one and the same person. The

claimant received a recess appointment as a member of the Board October 20, 1884. Immediately after this recess appointment claimant was appointed by the Board its secretary. That the date of this appointment by the Board as its secretary was on or before November 5, 1884, is certain, because in Finding III it is shown that claimant has performed his duty as secretary from November 5, 1884, and also because it is found that the National Board of Health has held no meeting since November, 1884. The appointment as secretary was therefore before the appointment of claimant as a member of the Board, which was December 4, 1884, and claimant was *never reappointed by the Board as its secretary after* the appointment as a member of the Board December 4, 1884.

The recess appointment and the appointment by and with the advice and consent of the Senate were separate and distinct acts. The second was *not* a *continuation* of the *first* appointment but was as distinct therefrom as if another person had received such second appointment.

> The next clause of the Constitution is [says Story, 2 Const., § 1555], The President shall have the power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.
>
> The appointments so made, by the very language of the Constitution, expire at the next session of the Senate, and the commissions given by him have the same duration. When the Senate is assembled, if the President nominates the same officer to the office, *this is to all intents and purposes a new nomination to office, and, if approved by the Senate, the appointment is a new appointment and not a mere* continuation of the old appointment (*id.* § 1556).

In *The United States* v. *Kirkpatrick and Others* (9 Wheaton, 720) this court, by Story J., in commenting on this section of the Constitution, says (735):

> It has been suggested that the practice of the Government has been to consider such commissions as one continuing commission. But whatever weight the practice of the Government may be entitled to, in cases of doubtful construction, it can have no influence to change the clear language of the law. In short, if the nomination to and approval by the Senate was a mere confirmation and not equivalent to a new appointment, there was no necessity for the second commission; and yet, the argument supposes that it could not be dispensed with; for if no commission had been issued, the first, by its own limitation would have expired.

The first appointment ending wrought an end to the incidental office, the treasurership of the Board, and the claimant never thereafter having been appointed secretary, was never thereafter its *de jure* secretary. It will not avail the claimant to say that he performed the duties of the office under an implied sanction of the Board. There is no evidence in the findings of the Court of Claims that any member of the Board, save claimant himself, knew that he was acting as secretary, and the Board could only act as a body by way of ratifying the act of claimant, and this it has not done so far as the findings show. The most favorable view possible is that claimant was a *de facto* officer, but this will not enable him to maintain an action for the salary.

> While the acts of an officer *de facto* are valid, in so far as the rights of the public are involved, and

> in so far as the rights of third persons having an interest in such acts are concerned, still, where a party sues or defends in his own right as a public officer, it is not sufficient that he be merely an officer *de facto*. To do this he must be an officer *de jure*. (*The People ex rel. Winstanley* v. *Webber*, 89 Ill., 347, 348.)

This rule is so universal as to officers suing for salaries that an extended citation of authorities is unnecessary.

> *The People ex rel. Winstanley* v. *Webber* (89 Ill., 347, 348); *Dolan* v. *Mayor, etc., New York* (68 N. Y., 274); *McCue* v. *County of Wapello* (56 Iowa, 698); *Mathews* v. *Board of Supervisors* (53 Miss., 715); *Carrol* v. *Siebenthaler* (37 Cal., 193); *The People ex rel. Morton* v. *Tienan* (8 Abbott Pr. R., 359.)

The foregoing consideration applies to the third item, viz, the claim for compensation as treasurer of the Board. As the second contention of the defendant applies both to items 3 and 1, those claims will be considered together. Item 1 is a claim for salary as chief clerk and disbursing agent from July 1, 1883, to November 5, 1884, at the rate of $3,000 a year as chief clerk and $300 a year as disbursing agent, amounting to $4,442.77.

April 5, 1879, about one month after the date of the original act, the claimant was appointed chief clerk with a compensation fixed by the Board of $100 a month, to date from April 3, 1879. June 5, 1879, claimant was nominated by the Board to the Secretary of the Treasury as its disbursing officer. The Secretary of the Treasury appointed him such disbursing officer and required him

to furnish bond in the sum of $20,000. In his brief (p. 13) claimant's counsel has omitted to call the attention of the court to the fact that the Secretary of the Treasury in making the appointment as disbursing officer stated to him distinctly that "this appointment [is] to be *without compensation*."

June 12, 1879, claimant's salary was increased by the Board to $2,000, and February 4, 1881, to $3,000.

Claimant performed duty as chief clerk and disbursing agent until November 5, 1884, but received no compensation from the Board in this capacity from July 1, 1883, to November 5, 1884.

The only statute making mention of the office of chief clerk and disbursing officer is found in section 5 of the act of July 1, 1879 (21 Stat. L., 46).

So much as relates to the chief clerk and disbursing agent is in these words:

> SEC. 5. *That the chief clerk of the National Board of Health* shall act as disbursing agent for the Board, and shall give bond, conformably to section one hundred and seventy-six of the Revised Statutes, for the faithful performance of that duty, and for such service he shall receive three hundred dollars per annum, in addition to his salary as chief clerk.

It is noticeable that no one of the subsequent acts either providing for "sundry civil expenses" or supplying "deficiencies" in terms mentions such an officer as chief clerk and disbursing officer of the National Board of Health. With this review of the legislation the defendant is prepared to state the reasons why neither item three nor one ought to be allowed to the claimant.

It is contended by the claimant that these acts of Congress "recognize the existence" of the office of chief clerk, disbursing agent and treasurer in such a manner as to bring the case within the principles stated by this court in *United States* v. *Langston* (118 U. S., 389).

Whatever force there may be in the argument that the original act creating the Board is within the rule of the Langston case, it is clear that that rule does not apply to the subordinate agencies which the Board was authorized to employ. The acts cited do not *create* these agencies; neither do they *recognize* them in the sense of permanent statute offices. The evident purport of the various enactments was to place in the hands of the National Board of Health money to carry out the purposes of the enactments. So long as Congress supplied the money to support the Board's agencies, the Board was authorized to employ and pay them. But the Board, in the absence of appropriations made in its behalf, was not authorized to impose a single obligation on the part of the United States. Instead, therefore, of falling within the rule of the *Langston Case*, it comes within that of *Mitchell's Case* (109 U. S., 146).

In the opinion of the Court of Claims (transcript of record, p. 11) the proposition is clearly stated by Davis, J:

> A fund was given the board to disburse; under this power the claimant was employed; but his right to salary could not extend further than the appropriations made from time to time by Congress, and when Congress ceased to appropriate he was with-

out claim to further compensation. He did not hold an office, but was an employé whose only right to compensation rested on the appropriation acts.

This principle was stated by the Court of Claims; in *Beaman* v. *The United States* (19 C. Cls., 5), as follows:

> Where an appropriation act authorizes the Secretary of the Treasury to appoint assistant agents at a designated place, the office will expire by its own limitation with the expenditure of the appropriation. When the existence of an office depends entirely upon annual appropriations, the incumbent can not prolong its existence by continuing to perform its duties.

In *Shipman's Case* (18 C. Cls., 138, 147) it was said.

> Where an alleged liability rests wholly upon the authority of an appropriation they must stand and fall together, so that when the latter is exhausted the former is at an end, to be revived, if at all, only by subsequent legislation by Congress.

In *Mitchell's Case* (109 U. S., 146, 150), the court said:

> The whole question depends on the intention of Congress as expressed in the statutes. Whether a simple failure by Congress to appropriate any or a sufficient sum to pay the salary of an officer fixed by previous law is of itself an expression of purpose by Congress to reduce the salary, we do not now decide.

In the case under consideration Congress has never attempted in the true sense to "fix by law" the salary of the chief clerk, disbursing agent, and treasurer.

These things were left to the National Board of Health to do.

It will be observed that all the legislation by Congress subsequent to the act of March 3, 1879 (20 Stat. L., 484), denotes an intention varient with the theory upon which the Board was brought into existence.

The act of June 2, 1879 (21 Stat. L., 5), in which the appropriation of $500,000 is made, expressly provided in section 10 that " this act shall not continue in force for a longer period than four years from the time of its approval. Congress thus, in the inception of the scheme, pointed out that it was not to be permanent.

In the act approved August 7, 1882 (22 Stat. L., 315), making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1883, and for other purposes, it will be noted that no appropriation "for salaries and expenses of the National Board of Health" for chief clerk is made.

A sum was given the Board " for pay of secretary and disbursing agent," but not chief clerk.

Congress plainly indicated to the National Board of Health that it was to spend no more money for the paying the officer whom the Board had hitherto employed. Thus, while claimant had been paid by the Board up to and including June 30, 1883, at that date claimant knew that he was not thereafter to be recognized in the sum of money put at the disposal of the Board.

Again, in the act of March 3, 1883 (22 Stat. L., 613), Congress more pointedly than before indicated its change of policy. In this latter appropriation act the language is:

> For the National Board of Health: For *compensation* and *personal expenses* of members of the Board, ten thousand dollars.

Here was a total omission of chief clerk, disbursing agent, and secretary.

No act relating to appropriations for the National Board of Health is found till two years later. March 3, 1885 (23 Stat. L., 446–452), in the deficiency bill of that date, is the following:

> National Board of Health. For salary of the secretary of the Board, from April first, eighteen hundred and eighty-four, to March first, eighteen hundred and eighty-five, three thousand one hundred and thirty dollars.

While this act gives the Board money for the deficiency for secretary, messenger, and rent, it omits the "chief clerk." This omission is very significant, taken in connection with the fact that appropriations are made to the Board for two other officers.

The continued policy of Congress to put an end to the power of the Board to pay for these agencies is seen in the act for sundry civil expenses for the fiscal year ending June 30, 1886, approved March 3, 1885 (23 Stat. L., 478, 496). The appropriation is to the "National Board of Health: For salaries and expenses of the National Board of Health, five thousand dollars."

Congress omits to name chief clerk, disbursing officer, and Secretary.

Congress continued to express its policy by failing to provide at all for the Board for the fiscal year ending June 30, 1887, or for any subsequent year. And as if to put an entire termination of the Board and its agencies, August 4, 1886, by an act to supply deficiencies in appropriations for the fiscal year ending June 30, 1886, and for

other purposes (24 Stat. L., 256, 289), it appropriated "For salaries and expenses of the National Board of Health, sixty dollars."

While no further appropriation after March 3, 1885, has been made, Congress, on March 2, 1889 (25 Stat. L., 905, 912), appropriated a sum to provide for the transportation for storage of the relicts of the Board.

It can hardly be conceived what the intention of Congress was, unless it was as expressed in the concluding portion of the opinion of the Court of Claims, that—

> The course of legislation in regard to this Board shows a change of policy on the part of Congress, and an intention to place the members of the Board and its expenses within the control of the annual appropriation bills.

For these reasons it is respectfully submitted that the judgment of the Court of Claims dismissing claimant's petition is correct. It is believed not only is this judgment warranted on plain principles of law, but also that no injustice can be done in dismissing a claim sought to be sustained without natural equities upon refined technicalities.

JOHN B. COTTON,
Assistant Attorney-General.

○